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No. 87-731.

In the Supreme Court of the United States.

OCTOBER TERM, 1987.

GLOBE NEWSPAPER COMPANY AND
DAVID FARRELL,
PETITIONERS,

v.

EDWARD J. KING,
RESPONDENT.

Brief of Respondent Edward J. King in Opposition to Petition for Writ of Certiorari to the Supreme Judicial Court of Massachusetts.

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Questions Presented for Review.

The Boston Globe's then State House political columnist, petitioner Farrell, wrote in his Sunday column that the then Governor of Massachusetts "called a judge and demanded that he change a decision he rendered in a gang-rape case." The columnist's alleged source was the Massachusetts Treasurer, Robert Crane.

Questions for review are:

I. Whether the Massachusetts Supreme Judicial Court erred on the issue of constitutional malice in reversing the granting of petitioners' motion for summary judgment in this libel case and holding that there were obvious reasons for Farrell "to doubt the accuracy of [Crane's] report" and "that the report to Crane was as likely to have been fabrication or speculation as to have been the truth" where the Supreme Judicial Court ("S.J.C.") found that a jury would be warranted in finding:

> 1. That Farrell knew that in thirty-five years as an experienced journalist, he never heard of a similar occurrence, which indeed, he would regard as a "serious matter."
>
> 2. "It would be reasonable to infer from the deposition testimony that Farrell, an experienced journalist, published as a fact that the plaintiff had engaged in conduct which, if known, would discredit him in the eyes of a considerable and respectable segment of the community, that Farrell knew that his statement was likely to have that effect, and that he knew that the conduct, if it had occurred, would have been highly unusual."
>
> 3. That Farrell knew Crane was relying on *hearsay*, perhaps multi-level.
>
> 4. That when Crane spoke to Farrell *and* at the time of Crane's testimony, Crane did not in fact know his informant's *identity*.

5. *That Farrell never asked Crane who was his informant* or indeed, any question at all in the face-to-face conversation when Crane revealed his story to Farrell.

6. That Crane never told him who was the informant.

7. That Farrell never asked the judge to verify the information.

8. That Farrell never asked anyone else to do so. (Pet. App. A. at 17a-18a; 400 Mass. at 721-722.)

II. Whether the statement about the Governor is actionable or is it protected "opinion."

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Opinions Below.

See Petition for Certiorari, p.2.

Jurisdiction.

See Statement of Jurisdiction in Petition for Certiorari, p.2.

Constitutional Provisions Involved.

See Petition for Certiorari, pp. 2-3.

Statement of the Case.

The following supplies omissions and corrections in petitioners' Statement of the Case (Pet. 3-8).

The action brought herein was not brought in "Kicking off the 1982 election year" (against the former Governor Michael Dukakis) and no such finding was made below (Pet. 3).

In quoting the section of the column in issue, petitioners by ellipsis carefully leave out the following at the end of the second paragraph on page 5 of the Petition, after the phrase "demanded that he change a decision he rendered in a gang-rape case. . . ." (*sic*.)

> The judge acquiesced and proved two things: (1.) King's original appointment of him was a colossal blunder. (2.) He is unfit to remain on the bench.

(Pet. App. B. at 90a.) As to the final sentence of the second paragraph quoted on page 5 of the Petition:

> The Governor's libel action is predicated on the last sentence quoted and his assertion that he had never made such a call.

The Superior Court specifically noted:

> The defendants concede for purposes of this motion the falsity of the statement that the plaintiff called and exerted pressure upon Judge Abrams, but maintain that the statement is not defamatory.

(Pet. App. B. at 62a.)

Further, petitioners omit that Farrell *intended* the sentence "in October when King called a judge and demanded that he change a decision he rendered in a gang-rape case" as a *factual* statement and not a mere expression of opinion (Farrell Deposition, J.A. I at 319).[1] Among other facts omitted or passed over lightly by the petitioners are the following: in thirty-five years of journalistic experience, Farrell had never heard of an instance similar to the alleged Governor King call to Judge Abrams (Farrell Deposition, J.A. I at 271, 411). Farrell recognized the seriousness of his accusation (Farrell Deposition, J.A. I at 270, 271, 316). Moreover, Farrell had no notes for this admittedly serious allegation but had notes for the other parts of the article (Farrell Deposition, J.A. I at 259, 264-265). Initially, Farrell unwittingly admitted that he made the accusation "directly from his mind without the intervention of any source material" (Farrell Deposition, J.A. I at 269). On October 18, 1985, Farrell admitted to Globe Editors Janeway and Nolan that he "*got* the source for this column" and that he "named the source, [and he did his] best to give the deposition on this case" (Nolan Deposition, J.A. II at 847-849) (emphasis supplied). Editor Janeway then said "Well, the Globe is going to continue to represent you in this case." (*Id.* at 848, Lines 9-10).

Apparently realizing his dilemma, Farrell later claimed that he had only one source for the statement at issue and that source was "confidential" (Farrell Deposition, J.A. I at 275-276, 418-419, 443). The alleged source was Massachusetts State Treasurer Robert Crane.

Crane, the alleged source, *without knowing who had told him* (Pet. App. A. at 17a; 400 Mass. at 721), and despite the fact in almost thirty years of his political career he had never heard of a similar event as described by Farrell, allegedly passed on what was in essence if not in fact an accusation that the Governor had obstructed justice (Crane Deposition, J.A. II at 523-526). Despite the unpecedented nature of the recent

[1] "J.A." refers to the Joint Record Appendix of the parties in the S.J.C.

accusation, Crane racked his brain a hundred times to try to think who told it to him (Crane Deposition, J.A. II at 523-524). Crane could not remember who told him of this alleged event or whether his "source" told him by telephone or in person (Crane Deposition, J.A. II at 533). Nor could Crane remember (though he had "heard" it within at most several weeks) (Crane Deposition, J.A. II at 512, 513, 523-524), whether he received his unprecedented "information" from one or more persons, or whether they were male or female or any combination thereof (Crane Deposition, J.A. II at 526). Crane in fact conceded he spoke about this information to Farrell not merely *once* before Farrell's column of November 8, 1981 but "*maybe two times*" (Crane Deposition, J.A. II at 512), "*maybe twice*" (Crane Deposition, J.A. II at 513) (emphasis supplied).

Indeed, Crane never remembered the identity of the alleged source — neither at the time he allegedly told Farrell of this unprecedented, not merely unusual, event, nor at the time he testified (Crane Deposition, J.A. II at 530-531).

Although in their combined sixty-five years of involvement with politics Farrell and Crane had never heard of a single instance similar to that alleged by Farrell, Farrell never asked Crane and Crane never told Farrell where Crane "heard" the story about the alleged call (Crane Deposition, J.A. II at 481, 522, 523, 525; Farrell Deposition, J.A. I at 415; Pet. App. A. at 17a; 400 Mass. at 721). Farrell never even asked the elementary question of Crane: "*Where did you hear of that unprecedented event?*" or "*From whom did you hear that story?*" or indeed, any question at all.

Furthermore, the evidence rendered the inference likely that Farrell knew that the Governor had denied calling the judge at the Governor's October 8, 1981 press conference (Bradlee Deposition, J.A. II at 618).

A mere eight days after it learned of Farrell's deposition testimony in this case, that Crane was the "source" and Farrell's admission that he had received payments from a company of which Crane was a director, *The Globe fired* Farrell (Farrell Deposition, J.A. I at 339).

Finally, petitioners leave out a substantial part of the Supreme Judicial Court's holding, while again using ellipsis, in the footnote on page 8 of the Petition, leaving out the part of the opinion which refers to the "*deposition testimony*" of Farrell and Crane, and is contained in the two preceding paragraphs on pages 16a and 17a of Petitioner's Appendix A.; 400 Mass. at 720-721.

Thus petitioners purport to sum up the Supreme Judicial Court's opinion on the point as follows:

> The SJC reversed, holding the statement was not "opinion" and that a respectable segment of the community could distinguish between the Governor's admitted public and alleged private actions. Summary judgment was, accordingly, inappropriate because a jury should consider whether the claim about the call was defamatory (App. 11a-15a). The SJC also reversed the finding of no malice as a matter of law. On that issue, the SJC acknowledged that Farrell had no reason to doubt the "veracity and accuracy" of his source, the Treasurer. (App. 18a.) The Court asserted, however, that since (i) the Treasurer did not say he overheard the call, (ii) Farrell did not investigate further; and (iii) such a phone call would have been "highly unusual," a jury would

be justified *on these facts alone* in inferring constitutional malice. (App. 17a.)[8]

Petitioners sought reconsideration of the decision. (App. 95a.) That petition was denied. (App. 104a.)

. . . . . .

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[8]The SJC wrote:

> It would be reasonable to infer . . . that [Farrell] knew that the conduct, if it had occurred, would have been highly unusual. Also, a jury would be warranted in finding that Farrell published the challenged statement without investigation or verification, and with the knowledge that the only information he had was hearsay, perhaps multi-level, that Crane neither disclosed his source nor vouched for his source's reliability or for the reliability of his sources's source, if there was one, and that the report to Crane was as likely to have been fabrication or speculation as to have been the truth.

(Pet. 8.) (Emphasis supplied.)

The two preceding paragraphs omitted in the footnote ellipsis are:

> Our review focuses on the deposition testimony of Farrell and Crane. Farrell testified that State Treasurer Robert Crane was his source, and his only source, for stating that the plaintiff had called the judge who had presided over the rape trial and demanded that the judge change his decision. Crane testified that, during a luncheon conversation, he had told Farrell that it was Crane's "understanding that the Governor was upset and called the judge, raised hell about it, said it was a lousy decision, and it should be changed." After testifying that he was unable to recall "the language [he] used to Mr. Farrell," Crane was asked, "Now, you said that you told Mr. Farrell that you had heard that Governor King had

> telephoned [the judge]? Did I understand you correctly?" Crane's answer was "You did." That evidence would warrant findings that Farrell knew that Crane was not purporting to have personally witnessed the reported conversation, and that he was only repeating what he had been told. From what Crane did not say as well as from what he said, a jury also would be warranted in finding that Crane's statement to Farrell suggested that Crane's source was neither the plaintiff nor the judge.
>
> *Crane testified that, when he spoke to Farrell, Crane did not know who his informant had been, and that, at the time he testified, he did not know the informant's identity. Farrell's testimony was that he never asked Crane who Crane's informant had been, that Crane never told him, that Farrell never spoke to the judge to verify the information, and that Farrell never asked anyone else to do so. Farrell also testified that, in his thirty-five years of journalistic experience he had never heard of a similar occurrence, and that he would regard as "serious" a chief executive's demanding that a judge change a decision in a criminal case.*

(Pet. App. A. at 16a-17a; 400 Mass. at 721-721.) (Emphasis supplied.)

Reasons for Denying the Writ.

As to petitioner's "First" reason, the "protection for discussion of government under the First Amendment" (Pet. 8), respondent submits that the SJC's opinion correctly states:

> We agree with the plaintiff, as did the motion judge, that the statement that the plaintiff "called a

> judge and demanded that he change a decision he had rendered in a gang-rape case" was unambiguously a statement of fact. This was a statement that a specific, verifiable event had occurred. There was neither imprecision in meaning nor anything in the context of the article that suggested that the statement was not factual. Indeed, the statement, in context, functions as factual support for the author's critical characterization of the plaintiff's attitude toward other State officials."

(Pet. App. A at 13a; 400 Mass. at 717.)

The court therefore correctly held that these factors tended "to establish [the] statement as one of fact rather than of opinion for First Amendment purposes." *Id.*

As to the "Second" reason, the petitioners, who in effect have created a non-issue, then attempt to escalate the non-issue into grounds for certiorari. Petitioners do this by erroneously and continuously interpreting the SJC's opinion on constitutional malice as laying down a "new" test, "a negligence type test" (Pet. 13), when in fact no such test was laid down, and the SJC correctly follows this Court's opinion in *St. Amant* v. *Thompson,* 390 U.S. 727 (1968).

In any event, the allegations made herein by Farrell involved not merely some question of the motive of a public official, which might be argued to be protected opinion, but an accusation of "criminal conduct" — obstruction of justice.

I. Supreme Court Review Is Not Necessary Herein to Protect Discussion of Governmental Affairs.

The petitioners try to raise in this point, as throughout the case, that this is a case of "Seditious Libel" and stems, in effect from the Sedition Act, 1 Stat. 596 (1798).

The petitioners submit this as merely an attempt to quote one paragraph of the complaint below out of context in order to avoid the fact that the issue herein involves an unambiguous, factual and *concededly false* statement of fact as to a verifiable event — that is an alleged specific phone call by the Governor to a sitting judge demanding and ordering him to change specific sentences in a major felony case.

II. The Decision Below Is Not Based on a Failure by Petitioner Farrell to Investigate Hearsay Evidence, But on Traditional Constitutional Malice.

A. *The Decision Below Is in No Way "Inconsistent With* New York Times *and* St. Amant."

Petitioners baldly state that "[t]he record also contained no evidence that Farrell had serious (or, indeed, any) doubts about the truth of his statement." (Pet. 10.) Petitioners then repeat their alleged "summary" of the court's opinion, which "summary" contains the ellipsis, carefully omitting an important part of the SJC's opinion in reference to the above (Pet. 8).

Though the petitioners here concede the SJC "purportedly" relied on *St. Amant* v. *Thompson*, 390 U.S. 727 (1968) (Pet. 11), they claim the decision's "mischief" is "that it mutates actual malice into negligence, thus eviscerating [*sic*] *New York Times*." (Pet. 12.) *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

It is respectfully submitted that no such new rules were ever laid down by the SJC in its opinion of August 17, 1987. Rather, the SJC correctly followed the well known U.S. Supreme Court rule of *St. Amant* v. *Thompson* that "[l]ikewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant *or* the accuracy of his reports." *Id.* 390 U.S. at 732 (emphasis supplied).

The petitioners choose carefully to avoid the issue which arose on summary judgment — *not* whether Farrell gave some testimony, parts of which might perhaps conceivably support a finding that he had indeed believed what Crane said in the past (veracity) or whether Crane customarily accurately stated what he heard in the past, *but* rather, whether because of other evidence — and indeed very strong evidence — a jury would be warranted in finding that in October 1981, Farrell had a number of "obvious reasons to doubt the *accuracy* of [Crane's] *report*." (Emphasis supplied.) Said reasons include:

1. That Farrell knew that in thirty-five years as an experienced journalist, he never heard of a similar occurrence, which indeed, he would regard as a "serious" matter.

2. "It would be reasonable to infer from the deposition testimony that Farrell, an experienced journalist, published as a fact that the plaintiff had engaged in conduct which, if known, would discredit him in the eyes of a considerable and respectable segment of the community, that Farrell knew that his statement was likely to have that effect, and that he knew that the conduct, if it had occurred, would have been highly unusual."

3. That Farrell knew Crane was relying on *hearsay*, perhaps multi-level.

4. That when Crane spoke to Farrell *and* at the time of Crane's testimony, Crane did not in fact know his informant's *identity*.

5. *That Farrell never asked Crane who was his informant* (and indeed never asked *any* questions at all) in the face-to-face conversations when Crane "revealed" his story to Farrell, and not merely on one occasion but "maybe twice" (see *supra*, p. 4).

6. That Crane never told him who was the informant.

7. That Farrell never asked the judge to verify the information.

8. That Farrell never asked anyone else to do so. (Pet. App. A at 17a-18a; 400 Mass. at 721-722.) (Emphasis supplied.)

Indeed, an inference could be drawn that Crane was not Farrell's source, if there was one (see p. 3 *supra*). Thus there were obvious reasons for Farrell "to doubt *the accuracy of* [*Crane's*] *report.*" *Id.* (emphasis supplied).

As stated above, the standard of *St. Amant,* carefully followed by the SJC, involves not only where there are obvious reasons to doubt the "veracity" of the informant, but also the *"accuracy of his report." St. Amant, supra,* 390 U.S. at 732 (emphasis supplied). The SJC also stated that "Farrell had obvious reasons to doubt the veracity and accuracy not of Crane, but of Crane's undisclosed informant and any other informants in the chain of communication." (Pet. App. A at 81a; 400 Mass. at 722.) Examined in the context of that opinion, and not as petitioners repeatedly misinterpret it, this surely indicates that the court had *not* set forth a brand new standard for constitutional malice, but rather simply determined that Farrell had numerous "obvious reasons" to "doubt the accuracy of [Crane's] report." This is because Farrell kept a rigid silence while Crane told him, on two occasions, his "unprecedented" story, and Farrell never even bothered to ask Crane the elementary questions, "Where did you hear that from?" or "from whom?" or, indeed, any questions at all.

> "The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone

> call. Nor will they be likely to prevail when the publisher's allegations are so *inherently improbable* that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports" (footnote omitted). *St. Amant* v. *Thompson, supra* at 732. (Emphasis supplied).

Quoted in Pet. App. A. at 18a; 400 Mass. at 722. Further, that Farrell knew Crane was relying on hearsay, perhaps multi-level, and if indeed he had simply asked Crane where he heard it or from whom, which Farrell did not ask, Crane would have to tell him he did not in fact at any time — *whether at the time of his testimony or when he spoke to Farrell before the article was published — know the identity of his informant.* (Pet. App. A at 17a; 400 Mass. at 721).[2]

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[2] Even if there *were* — and respondent says there is not — an ambiguity in the SJC's unanimous opinion on this point, the remedy would be, not to find as petitioners assert, a "new" negligence standard was set up for public official-public figure cases, but rather to follow this Court's procedure in *Time, Inc.* v. *Firestone*, 424 U.S. 448 (1976) and remand for further proceedings to resolve the "ambiguity":

> It may be argued that this is sufficient indication the court found petitioner at fault within the meaning of *Gertz*. Nothing in that decision or in the First or Fourteenth Amendment requires that in a libel action an appellant court treat in detail by written opinion all contentions of the parties, and if the jury or trial judge had found fault in fact, we would be quite willing to read the quoted passage as affirming that conclusion. But without some finding of fault by the judge or jury in the Circuit Court, we would have to attribute to the Supreme Court of Florida from the quoted language not merely an intention to affirm the finding of the lower court, but an intention to find such a fact in the first instance.
>
> Even where a question of fact may have constitutional significance, we normally accord findings of state courts deference in reviewing constitutional claims here. See, e.g., *Lyons* v. *Oklahoma*, 322 U.S. 596, 602-603 (1944), *Gallegos* v. *Nebraska*, 342

The basic issue is not, as Globe and Farrell argue, a question of failure to investigate "undisclosed informants." Farrell had obvious reasons to doubt the accuracy of Crane's report when he spoke to Farrell as indicated by Farrell's very careful silence when Crane told him (and on two occasions) the story, involving on its face not only an unprecedented event but one involving the crime of possible obstruction of justice. (See *infra*, pp. 20-21). Clearly a jury could find that Farrell did not ask Crane these inherently called-for questions because of Farrell's doubts or fear of what the answers might have been.

That is why the unanimous opinion of the SJC stresses "Farrell's testimony was that he never asked Crane [in the face-to-face conversations] who Crane's informant had been, that Crane never told him . . ." (Pet. App. A at 17a; 400 Mass. at 721).

The Supreme Judicial Court therefore, following *St. Amant*, unanimously reached its conclusion, without laying down any new rule or standard of law on Constitutional malice, ". . . *that the report to Crane was as likely to have been fabrication or*

> U.S. 55, 60-61 (1951) (opinion of Reed, J.). But that deference is predicated on our belief that at some point in the state proceedings some factfinder has made a conscious determination of the existence or nonexistence of the critical fact. Here the record before us affords no basis for such a conclusion.
>
> It may well be that petitioner's account in its "Milestones" section was the product of some fault on its part, and that the libel judgment against it was, therefore, entirely consistent with *Gertz*. But in the absence of a finding in some element of the state-court system that there was fault, we are not inclined to canvass the record to make such a determination in the first instance. Cf. *Rosenblatt* v. *Baer*, 383 U.S. [75,] at 87-88 [(1966)]. Accordingly, the judgment of the Supreme Court of Florida is vacated and the case remanded for further proceedings not inconsistent with this opinion.

Id. at 463-464.

speculation as to have been the truth." (Pet. App. A at 18a; 400 Mass. at 722.) (Emphasis supplied.)

Yet, the petitioners apparently argue the the SJC sets forth a new rule that in effect, merely because Crane was not an "eyewitness," there is therefore evidence of constitutional malice based on some "negligence" theory.

The petitioners urge this Court to superimpose on the SJC's opinion something which is simply not there. The SJC, in writing "of Crane's undisclosed informant and any other informants in the chain of communication," is *not* suggesting that Farrell ought to have "investigated" these sources and that the failure to do so is tantamount to malice. Crane did not know who the source was even at the times he told Farrell, though he had allegedly heard it within at most several weeks. The argument that the SJC, casually and unanimously was laying down a new negligence test in a public figure-public official case is unwarranted. The evidence of recklessness (lack of good faith and obvious doubt) stems from Farrell's admission that he failed to ask then and there, not merely in the *first* talk with Crane *but also* in the *second* (see *supra*, p. 4), the very questions which would have inherently been on the lips of anybody when confronted with as grave an assertion as Crane made. "Where did you hear that?" or "From whom did you hear that?" These questions are the almost automatic response of a person confronted with news of such an unprecedented event. This is why *St. Amant* sets out two prongs in its opinion: 1) the veracity of the source (not an issue here); and 2) the inherent improbability of the event *itself* which must include "the accuracy of the report." *St. Amant, supra,* 390 U.S. at 732.

If, hypothetically, Farrell had asked the question which begged to be asked, and Crane had responded, "I heard it from a source I know to be reliable, but which I can't disclose, as confidential" this would be a different case altogether. To

require Farrell then to confirm with other sources might be a requirement to investigate and raise other issues. But we know from the evidence as indicated in the SJC's opinion that Crane's answer in the instant case would have been, "I don't know where I heard this very recent story nor from whom, nor whether it was a male or female." The SJC found, in substance, that the jury could infer from this that Farrell acted in *"bad faith,"* not merely because the report was hearsay; but because he failed to ask the almost automatic question which would have elicited an answer that would have plainly shown the story to be unreliable.

Further, inferences on summary judgment *must* be resolved to favor the non-moving party, the respondent King (*e.g.*, Crane's testimony that he told Farrell the "story" "maybe two times," "maybe twice" (Crane Deposition, J.A. II at 512, 513); *Anderson* v. *Liberty Lobby, Inc.* 477 U.S. 242, 106 S.Ct. 2505, 2513 (1986); *Attorney General* v. *Bailey,* 386 Mass. 367, 436 N.E.2d 139, *cert. denied,* 459 U.S. 970 (1982).

Thus contrary to petitioners' unfounded assertions, the SJC did not create a new standard as to what constitutes actual malice[3] but rather dutifully followed this Supreme Court's

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[3] In the next to last paragraph of their argument on this point petitioners state:

> Moreover, any doubt that a negligence-type test was intended was removed when the SJC cited its decision below in a non-public figure case. *Jones* v. *Taibbi,* 400 Mass. 786, 799-800, 512 N.E.2d 260 (1987) ("a jury could find that Channel 5 and Taibbi acted negligently in publishing their reports of Shamshak's allegations. *Cf. King* v. *Globe Newspaper Co.* . . .")

(Pet. 13.)

Again, petitioners use their repeated and inappropriate ellipsis. The reference put in ellipsis is to Farrell's "obvious reasons" to doubt Crane's *report,* as explained, *supra,* and not to a "negligence type-test" in public official-public figure cases.

definition of actual malice as set forth in *St. Amant* or *New York Times*.[4]

B. *The Decision Does Not Create a Conflict Among Lower Court Decisions.*

Petitioners claim that the SJC's decision somehow "creates a conflict among lower court decisions." (Pet. 14.) Two different lines of cases are set out by the petitioner to illustrate this conflict. The initial weakness in the petitioners' argument is that the issue they focus upon is not the issue which is presently before this Court. The illustrative cases are supposedly decided on the issue of failure to "investigate" beyond the source. That this is not the issue before this Court has been discussed, *supra*. Further, the cases petitioners cited generally involve

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[4] Petitioners, in a footnote, cite *Bose Corp.* v. *Comsumers Union of United States, Inc.*, 466 U.S. 485 (1984), as holding that "disbelief of the speaker alone cannot support a finding of malice." (Pet. 11 n.10.) The petitioners are again suggest here that *Bose* is somehow relying on *dictum* in *St. Amant* creating some confusion as to the proper standard. This is a complete oversimplification. In *Bose* the "disbelief" was of the witness *at trial*, not disbelief of the source at the time of publication. The witness

> . . . had made a mistake [at the time of publication] and when confronted with it [at trial], he refused to admit it and steadfastly attempted to maintain that no mistake had been made — that the inaccurate was accurate. That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy *at the time of publication*.

466 U.S. at 512 (emphasis supplied). This is a far different result than the petitioners suggest in their "distillation" of the case.

This same note further suggests that this Court in *St. Amant* meant something more than unusual by the term "inherently improbable." But, the reported event in the present case was *more* than unusual — in fact "highly unusual" and indeed, unprecedented. Witness the evidence that neither Farrell nor Crane had heard of a similar event in a combined sixty-five years of political and journalistic experience.

neither an unprecedented event in that jurisdiction — an allegation that a sitting governor personally called a sitting judge and demanded, not merely complained, that the judge change a decision he had rendered in a gang-rape case — nor a finding as to the existence of obvious reasons to doubt the "accuracy of the report." See, e.g., *Speer* v. *Ottaway Newspapers, Inc.*, 828 F.2d 475 (8th Cir. 1987) (Alleging police brutality against employee reporter, plaintiff tried to show actual malice by way of *respondeat superior* even though employee reporter was merely source not author of story. Court ruled jury could not impute actual malice simply because source was employee. Court did find that publishers had no reason to *seriously doubt* the accuracy of the *report*. Failure to investigate was not an issue in this case. In fact, the court found that the report of the source had been corroborated by other eyewitness accounts obtained by the publisher.); See, e.g., *Grzelak* v. *Calumet Publishing Co.*, 543 F.2d 579 (7th Cir. 1975) (allegations of political patronage — not an unprecedented event); *Colombo* v. *Times-Argus Association*, 135 Vt. 454, 380 A.2d 80 (1977) (focusing on sources of information and not on the accuracy of reports involving an allegation of distributing a picture of a college student "streaking" — not an unprecedented event); *Hall* v. *Rogers*, 490 A.2d 502 (R.I. 1985) (examined only the veracity of the source and did not inquire as to the accuracy of the report concerning a patronage position — not an unprecedented event); *Burns* v. *Times-Argus Association*, 139 Vt. 381, 430 A.2d 773 (1981) (focusing on neither the veracity of the improper personal use of state property — not an unprecedented event); *Curran* v. *Philadelphia Newspapers, Inc.*, 497 Pa. 163, 439 A.2d 652 (1981) (focusing on issue as to whether plaintiff resigned voluntarily or whether he was forced to — not an unprecedented event).

The petitioners try to extend their position *a fortiori* by citing cases where courts have held that reliance on even a

biased source does not raise a triable issue on the question of malice. Again they are focusing on the single issue of "failure to investigate beyond a source" to set up one side of the dichotomy. Even a cursory examination of these cases, however, shows the alleged dichotomy to be illusory. The court did not decide these cases on the narrow ground on whether reliance on a biased source without further investigation could be a basis for a finding of malice. See, e.g., *Wanless* v. *Rothballer*, 115 Ill.2d 158, 104 Ill. Dec. 759, 503 N.E.2d 316, 322 (1986). Plaintiff tried to raise the malice issue by showing, among other things, that defamer relied on biased sources. The court found that mere reliance on a biased source is not evidence of malice *per se* if the ". . . sources were *in a position to know* and where their assertions *are not so improbable as to engender serious doubt.*" *Id.* 503 N.E.2d at 322 (emphasis supplied). In this case also there was corroboration of the biased sources' reports. See also *Hardin* v. *Sante Fe Reporter, Inc.*, 745 F.2d 1323 (10th Cir. 1984) (Plaintiff alleged malice, not on simple reliance on "self aggrandizing source," but on failure to check background of source himself. The holding turns not on failure to investigate beyond a source, but on plaintiff's attempt to show malice for failure to investigate source himself. This is a different question even by the petitioners' erroneous statement of the issue.); *Loeb* v. *New Times Communication Corp.*, 497 F. Supp. 85 (SDNY 1980). In *dictum* discussing issue, the court suggested that plaintiff would be barred on malice issue not solely because he introduced evidence that defendant relied on biased sources, but because he failed to show such "reliance upon any of the allegedly biased individuals was *unreasonable*." *Id.* at 93 (emphasis supplied). The holding actually turned on finding that statements were not libellous in nature. The malice issue was thus not reached in this case.

The petitioner then attempts to present the other side of the dichotomy which establishes the existence of a conflict among the lower courts. It consists of footnoted cases which are supposed to represent decisions where some sort of opposite holdings are arrived at than in the above noted cases. The problem with this segment of the petitioners' argument is twofold. First, the above noted cases do not stand for the isolated proposition that failure to investigate beyond a source would not establish malice as a matter of law. Secondly, the petitioners note that all of their "opposition" cases are distinguishable from the case at bar. In two of the cases cited, *Kuhn* v. *Tribune-Republican Publishing Company*, 637 P.2d 315 (Col. 1981) (No source) and *Stevens* v. *Sun Publishing Company*, 270 *S.C.* 65, 240 S.E.2d 812, *cert. denied*, 436 U.S. 945 (1978) (articles based on unreliable source), the issues are so admittedly different that not even an apparent conflict exists with the above noted cases. Thus, the dichotomy is not a dichotomy at all. The lower court rulings on the failure to investigate the issue are not evidence of a split which need to be addressed by this Court. Moreover, analysis shows these decisions to be either distinguishable, or supportive of the position taken by the respondent in the case now before the Court.

C. *The Decision Below Will Not Result in Unwarranted Self-Censorship.*

Petitioners' whole impassioned argument here has already been answered, *supra*; it is, again, based on a distortion of the SJC opinion herein.

III. There Is No First Amendment Protection for False and Libellous Precise Statements of Fact, Particularly Where These Can Reasonably Be Construed As Charging Commission of a Crime.

A. *The Statement Is One of Fact, Not of Opinion.*

As to the first reason for denying the writ, the respondent has already indicated that the SJC opinion (Pet. App A at 13a; 400 Mass. at 717) (see p. 8, *supra*) correctly held that the statement in issue was that "a specific verifiable event had occurred," with "neither imprecision in meaning nor anything in the context of the article that suggested that the statement was not factual." (Pet. App. A at 13a; 400 Mass. at 717.) The statement was clearly one of fact, not of opinion, and not protected for First Amendment purposes.

As this Court held in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340 (1974):

> [*T*]*here is no constitutional value in false statements of fact*. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co.* v. *Sullivan*, 376 U.S., at 270[, 11 L.Ed.2d 686, 95 ALR2d 1412]. They belong to the category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be delivered from them is clearly outweighed by the social interest in order and morality." *Chaplisky* v. *New Hampshire*, 315 U.S. 568, 572[, 86 L.Ed. 1031, 62 S.Ct. 766] (1942).

(Emphasis supplied.)

In attempting to overturn the SJC opinion that this case should reach a jury, the petitioners state the SJC's "very reason" is "that it could be interpreted to mean the Governor 'attempt[ed] to interfere with the independence of the judiciary.'" (Pet. 16.) But this analysis of petitioners suggests this was merely a matter of Farrell's opinion and omits the concededly (see p. 8, *supra*) false statement of specific fact.[5]

Not only does petitioners' statement that "King called a judge and *demanded* that he change a decision rendered in a gang-rape case" (emphasis supplied), hold respondent up to scorn and ridicule (Pet. App. A at 14a-15a; 400 Mass. at 718-719), it also constitutes a direct and unequivocal factual accusation that the then governor of Massachustts was guilty of the crime of obstruction of justice. See *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 330 N.E.2d 161 (1975) (an accusation of a crime is *per se* defamatory). Indeed, the SJC recognized obstruction of justice as a common law crime in Massachusetts in *Grand Jurors for Middlesex County for the Year 1974* v. *Wallace*, 369 Mass. 876, 880 n.7, 343 N.E.2d 844 (1976), stating:

> Although it is not entirely clear from the record, it appears that the only *crimes* which could be involved here are contempt of court and *obstruction of justice*. *These are the crimes* specified in the offers of immunity referred to, *supra*. Neither of these *crimes* is specified in the statute as a *crime* for which immunity may be granted.

(Emphasis supplied.)

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[5] Although in Massachusetts the governor cannot remove a judge, he appoints them, and can promote them to a higher court. Mass. Const. Pt. 2, cl. 2, § 1, Art. IX.

> ART. IX. All judicial officers, [the attorney-general,] the solicitor-general, [all sheriffs,] coroners, [and registers of probate,] shall be nominated and appointed by the governor, by and with the advice and consent of the council; and every such nomination shall be made by the governor, and made at least seven days prior to such appointment.

Further, the public may not distinguish an allegation describing a criminal offense punishable in the federal courts and the same allegation not rising to a criminal offense in Massachusetts. The public may well have reasonably perceived Farrell's allegations as equivalent to the obstruction of justice that occurred during the Watergate era. As petitioners admitted in their brief before the SJC (Appellees' Brief at 30), obstruction of justice is a federal crime. See 18 U.S.C. § 1503. The public may not be able judicially to separate the offense on jurisdictional grounds. To that public, petitioners' allegations may well have constituted the crime of obstruction of justice.

As to the SJC's opinion making actionable a statement of the type which "lies at the heart of political discussion" (Pet. 17) and petitioners citation of *Janklow* v. *Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.), *cert. denied,* U.S. , 107 S.Ct. 272 (1986), that case involved a charge that an attorney general was prosecuting an Indian leader for revenge, which motive was a possible *implication* of the words used. The court held that the First Amendment protected as opinion *imputations* regarding the *motives* of public officials. *Id.*, 788 F.2d at 1304-1305. The court was careful to exclude from its decision accusations "of criminal conduct" and added "the concept of actionable fact is not limited to allegations of crime, either for private citizens or public officials." *Id.* at 1305 n.6

> We do not hold that only accusations of actual criminal conduct against public officials are actionable as fact under the First Amendment. While these four factors (particularly those of precision and verifiability) might best be met by criminal allegations, the concept of actionable fact is not limited to allegations of crime, either for private citizens or public officials.

Id.

Again, there is no question of imputation of motive to respondent King, but rather that "a specific verifiable event had occurred."

B. *If the Statement in Issue Were One of Opinion, That Issue Was Waived by Farrell.*

Farrell *intended* the sentence "in October when King called a judge and demanded that he change a decision he had rendered in a gang-rape case" as a *factual* statement and not a mere expression of opinion (Farrell Deposition, J.A. I at 319).

Libel defendants can waive the constitutional protection afforded a statement of opinion by intending the statement to constitute a statement of fact because said protection is for the benefit of the libel defendant. *Gertz, supra,* 418 U.S. at 340. See Restatement (Appendix) Torts, § 566 comment c. (1981) ("The [d]etermination depends *upon the context and circumstances* surrounding the publication and *indicating whether the term is intended literally or not* and upon the precision or imprecision of the meaning for the expression") (emphasis added). Similar to other constitutional protections, such as the Fifth Amendment's protection against self-incrimination, and the Fourth Amendment's protection against wrongful search and seizure, the First Amendment's protection against liability for statements arguably resembling an opinion, can also be waived.

Moreover, an admission as to a libel defendant's state of mind or intent when writing an allegedly defamatory statement constitutes a binding admission. Liacos, Massachusetts Evidence 129-130 (5th ed. 1981).

IV. Certiorari Is Inappropriate Now.

Petitioners argue (Pet. 18) that if this case went to trial and *petitioners prevailed,* there would "be no review of this erroneous First Amendment interpretation." As stated above, the SJC merely applied the facts in the case at bar to this Court's standard in *St. Amant*. If every time the highest court in a state, in ruling on a summary judgment motion applying the facts to the existing law in a manner of which a media defendant does not approve, creates "an erroneous First Amendment interpretation" which may never be passed upon by this Court if said defendant prevails at trial, then the floodgates will surely open and this Court will be inundated with petitions, as the one herein.

In effect, to adopt petitioners' new and dangerously expansive modification of civil procedure would force all public officials or public figure libel plaintiffs successful in opposing a summary judgment motion, to argue the mertis of their case before this Court prior to receiving the opportunity of a trial.

In this light, it is clear that *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975) is not relevant. For, at the trial in the *King* case, the evidence may well be different than on summary judgment, and new federal issues bearing on the law of constitutional malice may well arise. In *Cox,* the U.S. Supreme Court reversed the judgment of the Georgia Supreme Court. The Georgia Supreme Court had decided that a civil action for invasion of the common law right of privacy for publishing the name of a rape victim, disclosed in public judicial proceedings, might go forward to trial despite the claim that the Georgia statute forbidding the same violates the First and Fourteenth Amendments. There was thus no issue of evidence at any new trial to be held involving the application of the First Amendment. Thus, there is no reason for certiorari to be granted in the instant case prior to trial and later appellate proceedings.

Conclusion.

The petition for certiorari, for all the reasons above, should be denied.

Respectfully submitted,

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